A

MAYA AHMAD FUAAD lwn. PP

MAHKAMAH TINGGI MALAYA, SHAH ALAM
ZULKIFLI BAKAR H
[RAYUAN JENAYAH NO: BA-41LB-98-10-2018]
10 SEPTEMBER 2020

B

PROSEDUR JENAYAH: *Pertuduhan – Perintah dilepaskan tanpa dibebaskan – Pendakwa Raya memohon pendakwaan terhadap tertuduh dihentikan – Majistret memerintahkan tertuduh dilepaskan tanpa dibebaskan – Sama ada Majistret terkhilaf dari segi fakta dan undang-undang – Sama ada Majistret sepatutnya memerintahkan tertuduh dilepaskan dan dibebaskan – Kanun Tatacara Jenayah, s. 254*

C

PROSEDUR JENAYAH: *Semakan – Semakan terhadap keputusan Majistret – Tertuduh dituduh di Mahkamah Majistret kerana membuat laporan palsu pada pihak polis – Pendakwa Raya memohon pendakwaan terhadap tertuduh dihentikan – Majistret memerintahkan tertuduh dilepaskan tanpa dibebaskan – Sama ada Majistret terkhilaf dari segi fakta dan undang-undang – Sama ada Majistret sepatutnya memerintahkan tertuduh dilepaskan dan dibebaskan – Kanun Tatacara Jenayah, ss. 254, 307(1) & 325*

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E

Perayu dituduh di Mahkamah Majistret kerana membuat laporan palsu pada pihak polis, satu kesalahan bawah s. 182 Kanun Keseksaan. Setelah mempertimbangkan representasi perayu, responden ('Pendakwa Raya') memohon pada Majistret, bawah s. 254 Kanun Tatacara Jenayah ('KTJ'), agar pendakwaan terhadap perayu dihentikan. Susulan permohonan Pendakwa Raya, Majistret memerintahkan perayu dilepaskan tanpa dibebaskan ('perintah DTD'). Maka timbul rayuan ini. Menurut perayu, Majistret terkhilaf dari segi fakta dan undang-undang apabila gagal memberikan perintah LDB setelah pihak pendakwaan menarik balik pertuduhan terhadapnya. Perayu merayu agar perintah DTD tersebut dibatalkan dan agar satu perintah lepas dan bebas ('perintah LDB') diberi. Membantah rayuan perayu, Pendakwa Raya membidas bahawa rayuan ini tidak boleh didengar kerana bukan keputusan yang boleh dirayu bawah s. 307(1) KTJ.

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Diputuskan (mengubah perintah terhadap perayu daripada dilepaskan tanpa dibebaskan menjadi dilepaskan dan dibebaskan):

H

(1) Rayuan dibatalkan kerana sifat perintah Majistret tidak boleh dirayu. Walau bagaimanapun, walaupun dimulakan secara rayuan, kes ini boleh dijadikan pendengaran semakan berdasarkan s. 325 KTJ. (perenggan 11 & 12)

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(2) Perintah DTD yang diberi oleh Majistret bukan satu perintah yang melupuskan hak pihak-pihak dalam tindakan. Satu-satu kes yang diperintahkan DTD boleh dituduh semula, pada bila-bila masa, atas arahan Pendakwa Raya. Majistret tersalah arah dari segi fakta dan undang-undang dan perintah yang sewajarnya beliau beri ialah LDB, dan bukan DTD, kerana Pendakwa Raya sendiri memilih tidak meneruskan pertuduhan terhadap perayu. Pendakwa Raya hanya memaklumkan ingin menarik semula pertuduhan terhadap perayu bawah s. 254 KTJ tanpa menyatakan alasan berbuat demikian. Tindakan Pendakwa Raya melayakkan Majistret menggunakan kuasa beliau bawah s. 254(3) KTJ untuk memberi perintah LDB pada perayu supaya dia dapat terlepas daripada pertuduhan tersebut secara mutlak dan boleh hidup dengan aman tanpa perlu bimbang kemungkinan dituduh dengan pertuduhan sama. (perenggan 10, 15, 16, 23 & 24)

Kes-kes yang dirujuk:

Chu Chee Peng v. PP [1973] 1 LNS 18 FC ***(dirujuk)***

Gurdit Singh Ajaib Singh v. PP [1983] 1 CLJ 89; [1983] CLJ (Rep) 575 HC ***(dirujuk)***

PP v. Au Seh Chun [1998] 3 CLJ Supp 56 HC ***(dirujuk)***

PP v. Mat Zain [1948-49] MLJ Supp 142 ***(dirujuk)***

PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(dirujuk)***

PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(dirujuk)***

Perundangan yang dirujuk:

Courts of Judicature Act 1964, ss. 31, 35(1)

Criminal Procedure Code, ss. 173(f), 254(3), 307(1), 316, 323, 325

Penal Code, s. 182

Bagi pihak tertuduh - Kamarul Hisham Kamarudin; T/n The Chambers of Kamarul Hisham & Hasnal Rezua

Bagi pihak pendakwaan - Siti Rohaida Che Hamid; TPR

Dilaporkan oleh Najib Tamby

PENGHAKIMAN

Zulkifli Bakar H:

Latar Belakang

[1] Perayu telah dituduh pada 16 April 2019 di Mahkamah Majistret Shah Alam di bawah s. 182 Kanun Keseksaan kerana membuat laporan palsu kepada pihak polis.

[2] Pada 1 Oktober 2018, setelah mempertimbangkan representasi perayu, pihak responden telah membuat permohonan kepada Majistret di bawah s. 254 Kanun Tatacara Jenayah supaya pendakwaan terhadap perayu diberhentikan. Justeru, berikutan permohonan tersebut, Majistret telah memerintahkan supaya perayu dilepaskan tanpa dibebaskan atau discharge not amounting to an acquittal (DNAA).

[3] Perayu yang terkilan dengan perintah Majistret tersebut telah memfailkan rayuan di mahkamah ini supaya perintah DNAA tersebut dibatalkan dan perintah lepas dan bebas atau acquitted and discharge (A&D) diberikan kepada perayu.

[4] Mahkamah ini telah melaksanakan kuasa semakannya di bawah ss. 323 dan 325 Kanun Tatacara Jenayah dan menggantikan perintah DNAA yang diberikan oleh Majistret kepada A&D.

[5] Responden dalam kes ini pula tidak berpuas hati dengan keputusan mahkamah ini telah memfailkan rayuan ke Mahkamah Rayuan.

Butir-butir Rayuan

[6] Merujuk kepada petisyen rayuan perayu di hlm. 7 hingga 10 rekod rayuan jilid 1, adalah disimpulkan bahawa perayu menyatakan bahawa Majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal memberikan perintah A&D setelah pihak responden menarik balik pertuduhan terhadap perayu menurut peruntukan s. 254 Kanun Tatacara Jenayah apabila responden telah menzahirkan dengan jelas bahawa mereka tidak mempunyai niat untuk meneruskan pendakwaan terhadap perayu.

Penilaian Mahkamah

[7] Seksyen 316 Kanun Tatacara Jenayah telah menggariskan tanggungjawab dan kuasa mahkamah yang mendengar rayuan seperti berikut:

> 316. Decision on appeal
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> At the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) **in an appeal from any other order, alter or reverse such order.**
>
> (penekanan ditambah)

[8] Sebelum saya menyentuh tentang inti pati rayuan ini sendiri, ingin dijelaskan bahawa pihak responden dan peguam pemerhati dalam kes ini telah membangkitkan bantahan bahawa rayuan ini tidak boleh didengar memandangkan ia bukanlah merupakan satu keputusan yang boleh dirayu sepertimana yang dinyatakan di bawah s. 307(1) Kanun Tatacara Jenayah yang menyatakan:

> (1) Except in any case to which section 305 applies and subject to sections 305 and 306 **any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter** to which he is a party **may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact** or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within fourteen days from the time of the judgment, sentence or order being passed or made, with the clerk of the Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.
>
> (penekanan ditambah)

[9] Dalam memutuskan perkara ini, saya telah merujuk kepada kes *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] MLJ 436 di mana Hashim Yeop Sani HMP (ketika itu) menyatakan:

> With regard to the first question, under s. 307(1) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case to which he is a party may appeal to the High Court against any such judgement, sentence or order. The word "order" is preceded by the words "judgment" and "sentence". **The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties.** (penekanan ditambah)

[10] Berpandukan kepada nas undang-undang di atas dan setelah memperhalusi sifat DNAA itu sendiri, saya bersetuju bahawa perintah yang diberikan oleh Majistret tersebut bukanlah satu perintah yang telah melupuskan hak pihak-pihak dalam tindakan ini. Sepertimana yang sedia dimaklumi bahawa sesebuah kes yang diperintahkan DNAA pada bila-bila masa boleh dipertuduhkan semula di bawah arahan Pendakwa Raya.

[11] Justeru, saya memerintahkan supaya rayuan ini dibatalkan kerana sifat perintah Majistret tersebut bukanlah sebuah perintah yang boleh dirayu. Walau bagaimanapun, demi keadilan semua pihak dalam kes ini, saya telah menggunakan kuasa semakan saya sebagai seorang Hakim Mahkamah Tinggi terhadap kes ini. Kuasa ini telah digariskan dengan jelas di bawah ss. 31 dan 35(1) Akta Mahkamah Kehakiman 1964 yang menyatakan:

Seksyen 31 Akta Mahkamah Kehakiman 1964:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts **in accordance with any law for the time being in force relating to criminal procedure.**
>
> (penekanan ditambah)

Seksyen 35(1) Akta Mahkamah Kehakiman 1964:

> (1) In addition to the powers conferred on the High Court by this or any other written law, **the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts,** and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, **either of its own motion** or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or **may give to the subordinate court such directions as to the further conduct of the same as justice may require.**
>
> (penekanan ditambah)

[12] Walaupun kes ini telah dimulakan secara rayuan, pada hemat saya, ia boleh dijadikan pendengaran semakan berdasarkan kepada peruntukan s. 325 Kanun Tatacara Jenayah yang menyatakan:

> (1) A Judge may, **in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge,** in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.
>
> (penekanan ditambah)

[13] Kaedah ini disokong dan disahkan dalam kes *Gurdit Singh Ajaib Singh v. PP* [1983] 1 CLJ 89; [1983] CLJ (Rep) 575; [1983] 1 MLJ 264 di mana Mohamed Dzaidin H (ketika itu) menyatakan dalam penghakimannya:

> *My powers of revision are provided under s. 325 of the Criminal Procedure Code.* These powers are consistent with s. 31 of the Courts of Judicature Act 1964. There are a number of authorities with regard to the powers of revision. In *Mallal's Criminal Procedure*, Fourth Edn., p. 482, it is stated as follows:
>
> The powers of revision are given to the High Court alone, and *the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge.* Their Lordships are clearly of opinion that

when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so, per Lord Atkin in *Chunbidya v. R.*, LR 62 IA 36; AIR 1935 PC 35.

(penekanan ditambah)

[14] Mengambil kira dalam kes ini rekod rayuan telah disediakan dan diserahkan kepada saya, ertinya rekod prosiding bagi kes di hadapan Majistret telah sampai kepada saya melalui rekod rayuan dan saya boleh menjalankan kuasa semakan ke atas kes ini.

[15] Berbalik kepada isu utama dalam kes ini sama ada Majistret telah tersalah arah dari segi fakta dan undang-undang apabila memberikan perintah DNAA dan bukannya A&D. Pada hemat saya, setelah meneliti latar belakang fakta kes ini, perintah yang sewajarnya diberikan oleh Majistret adalah A&D dan bukannya DNAA.

[16] Alasan utama adalah kerana dalam kes ini, surat makluman pihak Pendakwa Raya hanya menyatakan bahawa mereka ingin menarik semula pertuduhan terhadap perayu menurut s. 254 Kanun Tatacara Jenayah. Namun tidak dinyatakan alasan mereka memohon pertuduhan ditarik semula.

[17] Saya telah berpandukan kepada kes *PP v. Mat Zain* [1948-49] MLJ Supp 142 di mana Callow HMA (ketika itu) menyatakan:

I presume the withdrawal was made by the prosecuting officer in accordance with s. 254 of the Criminal Procedure Code. *This procedure may be caused by it becoming clear that the charge is not sustainable. (Sohoni, 14th Edn. page 651), or for reasons of expediency. The Court should record the reasons, and the discharge should amount to an acquittal unless good cause is otherwise shown;* an accused person is entitled to trial and determination; *only in exceptional circumstances should the charge be permitted to remain indefinitely held against him.*

(penekanan ditambah)

[18] Saya sendiri telah merujuk dan memperhalusi s. 254 Kanun Tatacara Jenayah yang menyatakan seperti berikut:

(1) *At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.*

(2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and

A thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(3) *Such discharge shall not amount to an acquittal unless the Court so directs.*
(penekanan ditambah)

B **[19]** Bagi menjelaskan maksud "shall be discharged" dan setakat mana kuasa Majistret di bawah frasa "unless the court so directs" saya telah merujuk kepada kes *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100 di mana Salleh Abas KHN (ketika itu) menyatakan:

C The question which we have to answer here was *whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all ...*

Until the decision of Mohamed Azmi J (as he then was) in *Public Prosecutor v. Mohamed Said* [1982] 1 LNS 115; [1984] 1 MLJ 50 it was generally D considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v. Public Prosecutor* [1948] MLJ 25 held that the earlier stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *Public Prosecutor v. Goh Kee Chuan* [1966] 1 LNS 138; [1967] 1 MLJ 174 and *Public Prosecutor v. Mahmud* [1973] 1 LNS E 119; [1974] 1 MLJ 85. This view was accepted by the Federal Court, whose judgment was delivered by Ong J in *Chuu Chee Peng v. Public Prosecutor* [1973] 1 LNS 18; [1973] 2 MLJ 35 ...

In *Chu Chee Peng's case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could* F *be material to the prosecution case* and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of *autrefois acquit* should the accused be subsequently recharged for the same offence. *The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal:*

G (1) When after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (section 173(f));

(2) *When because the main prop of the prosecution case has prematurely collapsed and further proceeding would be an exercise in futility, the prosecution may* H *in its discretion offer no further evidence (section 254)*

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge I not amounting to an acquittal.

(penekanan ditambah)

[20] Pada hemat saya, *ratio* yang diberikan dalam kes di atas adalah berkaitan dengan kuasa Majistret yang hanya boleh memberikan perintah DNAA di bawah s. 173(f) Kanun Tatacara Jenayah dan bukannya di bawah s. 254(3) Kanun yang sama. Ini adalah kerana, dalam kes *Chu Chee Peng v. PP* [1973] 1 LNS 18 tersebut, Ong HB (Malaya) (ketika itu menyatakan):

> Under s. 66 of the Courts of Judicature Act 1964 the questions referred for the decision of this Court are as follows:
>
> (a) *Whether a Magistrate in a summary trial is authorised by the provisions of s. 173(g) of the Criminal Procedure Code* (FMS Cap. 6) to rule that a charge is groundless (for reasons to be recorded) at any stage after plea and in the course of hearing prosecution witnesses but before the conclusion of the prosecution case
>
> *... Where the sole or main prop in the prosecution case prematurely collapses, the prosecuting officer may in his discretion offer no further evidence.* In that event, if it is clearly foreseeable that the witnesses remaining to be called would be unable to establish a *prima facie* case in the teeth of evidence previously recorded, *the accused may, of course, be acquitted, but such an order would in effect fall to be made equally well under para. (f) of s. 173, OR sub-section (ii) and (iii) of s. 254 of the Criminal Procedure Code.* (penekanan ditambah)

[21] Walau bagaimanapun, dalam kes yang sama, hakim tersebut turut menyentuh tentang s. 254(3) Kanun Tatacara Jenayah dan pada hemat saya, ia merupakan satu pengiktirafan bahawa Majistret boleh memberikan perintah A&D di bawah peruntukan tersebut kerana pihak pendakwaan tidak lagi berniat dan berminat untuk membuktikan kes mereka. Dalam masa yang sama, s. 254 Kanun Tatacara Jenayah sendiri tidak mengikat Majistret untuk semua keterangan didengar terlebih dahulu sebelum boleh memberikan perintah A&D berbeza dengan peruntukan di bawah s. 173 Kanun Tatacara Jenayah.

[22] Perkara ini boleh disahkan berpandukan kepada kes *PP v. Au Seh Chun* [1998] 3 CLJ Supp 56; [1998] 6 MLJ 179 di mana Suriyadi Halim Omar H (ketika itu) menzahirkan pandangannya:

> *Under s. 254 at any stage of any trial, before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted.*
>
> *In other words there is no necessity for the Magistrate to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed.*
>
> *Under this provision, unlike that of s. 173(f), the evidence is yet to be heard or adduced by the prosecution. Where the proposal of not continuing with the prosecution comes from the prosecuting officer,* leave must first be obtained from the court. This difference of approach is perhaps due to the desire of Parliament to

A permit the court to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purpose by the latter's prosecutors (*The State Of Bihar v. Ram Naresh* [1957] Cr LJ 567)

B Under this provision such discharge shall not amount to an acquittal unless the court so directs. *In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned Magistrate who must so specify the details. Notwithstanding this supposed room given to the Magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.*

C (penekanan ditambah)

[23] Justeru, berpandukan nas undang-undang serta prinsip mantap yang telah digariskan melalui semua autoriti di atas berkaitan aplikasi s. 254 Kanun Tatacara Jenayah, pada hemat saya, Majistret telah tersalah arah apabila memberikan perintah DNAA kepada perayu apabila pihak
D responden sendiri telah memilih untuk tidak meneruskan pertuduhan ke atas perayu tanpa menyatakan sebarang alasan yang mana ia boleh disimpulkan sebagai tidak akan menawarkan sebarang keterangan lanjut bagi menyokong pertuduhan yang dibuat sebelum ini.

[24] Tindakan pihak responden tersebut sebenarnya telah melayakkan
E Majistret untuk menggunakan kuasanya di bawah s. 254(3) Kanun Tatacara Jenayah untuk memberikan perintah A&D kepada perayu supaya dia dapat terlepas daripada pertuduhan tersebut secara mutlak dan boleh hidup dengan aman tanpa perlu bimbang dengan kemungkinan dipertuduhkan semula dengan pertuduhan yang sama. Pada hemat saya, semua orang mempunyai
F hak untuk hidup dengan aman tanpa sebarang ketakutan, kebimbangan atau ketidakpastian akan dituduh semula sepertimana yang telah termaktub di bawah Perlembagaan Persekutuan.

Keputusan Mahkamah

G **[25]** Saya memutuskan untuk menggunakan kuasa semakan saya di bawah ss. 323 dan 325 Kanun Tatacara Jenayah dan mengusik keputusan yang telah diberikan oleh Majistret dalam kes ini dengan mengubah perintah terhadap perayu tersebut daripada dilepaskan tanpa dibebaskan (DNAA) kepada dilepaskan dan dibebaskan (A&D) daripada pertuduhan di bawah s. 182
H Kanun Keseksaan.

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